THE

AMERICAN LAW REGISTER.

DECEMBER, 1852.

CARRIERS.

CARRIERS by land and water, unless relieved by express or implied contract between the bailor and the bailee, are by the common law responsible for all losses not occasioned by the act of God or the King's enemies.

Like every other species of bailment the particular responsibility devolved by law on the bailee may be waived partially or entirely by the agreement of the parties. *Modus et conventio vincunt le gem.*

These few and simple principles rationally applied to this class of bailments, afford a safe rule by which the liability of common carriers by land or by water, by sea or by river, by wagons and coaches, or by canals or railroads, may be determined with entire certainty.

In the early history of England the means of internal conveyances were pack-horses—then slow and lumbering wagons, which continued down to a late period in the last century, which saw the introduction of stage coaches and the use of canals, both of which have within the last five and twenty years been nearly superseded by the later invention of railways and the application of steam as

the motive power. Radical changes have also taken place in the important branches of Life, Fire, Marine and Inland Insurance, all of which, with the increase of transportation caused by the improvements of science, have supplied that complete indemnity against loss which was secured originally only by the imperfect operation of the common law. The improvements of modern art have infinitely increased the speed and the actual amount of transportation, while they have at the same time decreased the danger of loss, and have enabled the owner or the insurer to estimate, with nearly positive certainty, the chances to which the commodities in which they are interested are exposed.

The common law emanating, as it does, from the decisions of Judges made year after year, and accommodating itself to the varied changes of society, to the progress of civilization, to the extension of commerce, and to the wonderful inventions of art and science, which have placed the remotest parts of a continent in almost instant communication with each other, is to be found not merely in the Year Books, (which, to the disgrace of England, must be read in a bastard language which none but a few lawyers and antiquarians understand,) but in those daily exhibitions of judicial sagacity which furnished Great Britain last year with 2240 printed cases decided by its highest tribunals.

We are, therefore, to look not only to the ancient treatises of the law for the rules which govern commercial intercourse, but we are to seek them also in the enlightened sense and enlarged views of the great Judges of modern times, who have expounded and applied with wonderful skill the principles of our legal system, which existed only in their simplest form in a primitive and rude state of society. In no branch of the law has this been displayed to more advantage than in the law of Bailments, beginning with Sir John Holt, carried on by Sir William Jones, and terminating with the lamented Story, whose work on this subject forms a text book in Westminster Hall.

It has always been the law of England, that the responsibility of the bailee in every kind of bailment could be changed by the agreement of the contracting parties. The liability of the common carrier could always be varied by express agreement, and as a corollary,

by notices brought home to the bailor, and a qualified acceptance in accordance therewith, which necessarily entered into and formed a component part of the contract.

This rule is laid down by Judge Story, in his 549th section, as the settled law of England, and his words have been adopted and sanctioned by the English Court of Common Pleas, on the 8th of May last. In delivering the opinion of that Court, in *Austin and another* v. *The Manchester, Sheffield and Lincolnshire Railway Company*,[1] Mr. Justice Cresswell said: "Notices of various kinds have from time to time been published by common carriers, with a view to limit the responsibility cast upon them by common law. At one period there was a disposition in our Courts to hold that common carriers could not by their notices shake off that responsibility, but Mr. Story, in his work on Bailments, (549,) observes, 'The right of making such qualified acceptances seems to have been asserted in early times. Lord Coke declared it, in a note to *Southcote's* case.[2] and it was admitted in *Morse* v. *Slue*.[3] It is now fully recognized and settled, beyond any reasonable doubt, in England.' *For this he cites a number of authorities, and we think that he has drawn a correct conclusion from them.*"

We must, therefore, assume that those American Judges who have placed a different construction upon the English authorities were mistaken, and that the English Courts never did lay down the rule that the liability of the common carrier could not be limited or restrained or waived by the express or implied agreement of the parties.

In this state of the law, the Carrier's Act of 11 Geo. 4, and 1 Will. 4, c. 68, was passed on the 23d July, 1830, by which limitations by *public notice* were prohibited, but by the 6th section special contracts or agreements remained as they were before its passage, thereby distinctly recognizing the power of the common carrier in all cases, by a special agreement, to limit his responsibility in such manner as might be mutually agreed upon, and also

[1] 21 Law J., (C. P.) Reports, p. 179, 183; 16 Jur. 763 S. C. and post. "Recent Eng. Cases."

[2] 4 Rep. 83. [3] 1 Vent. 238.

affirming the former doctrine of the Courts, that it could be done by public notice brought home to the knowledge of the bailor, and thus creating a qualified acceptance only.

The rule, therefore, of the English common law, was that the liability of the common carrier might be limited in part or in whole *by express contract* or *by public notice and implied contract*, and such unquestionably should be the law of every American State deriving its common law from England, except so far as it has been altered by legislative enactment.

In our sister State of New York, a portion of its Judiciary did attempt to establish a contrary doctrine as a rule of the common law, and without legislative aid to engraft it upon their own jurisprudence. In *Hollister* v. *Nowlen*,[1] and *Cole* v. *Goodwin*,[2] decided in 1838, limitations by public notice were declared illegal, and in the last case Mr. Justice Cowen, in delivering the opinion of the Court, took the broad ground that the common carrier could not, even by express agreement, limit his liability, it being contrary to the policy of the common law, which only excepted losses by the act of God and the King's enemies. This was followed in 1842, by *Gould* v. *Hill*,[3] which decided that an express written contract could not limit the responsibility of the carrier, and Mr. Justice Cowen, in delivering the opinion of the Court, said: "For myself I shall do little more than refer to my opinion in *Cole* v. *Goodwin*,[4] and the reasons for such opinion as stated in the course of that case. It was to the effect that I could no more regard a *special* acceptance as operating to take from the duty of the common carrier than a *general* one. I collect what would be a contract from both instances, provided it be lawful for the carrier to insist on it; and such is the construction which has been given to both by all the Courts; *the only difference lies in the different kinds of evidence by which the contract is made out.*" "*When the Jury have found that the goods were delivered with intent to abide the terms of the general notice, I understand a contract to be as effectually fastened upon the Bailor as if he had reduced it to writing.*"

[1] 19 Wendell, 234.
[2] 19 Wendell, 281.
[3] 2 Hill, 623.
[4] 19 Wendell, 281.

It will be observed, therefore, that the law thus declared by the Supreme Court of New York, was founded upon the assumption that the policy and rigor of the Common Law prohibited every attempt to limit the liability of common carriers, whether by implied or express agreement. This is a tangible proposition, and is either true or false *in toto*.

The two last cases were decided by a bare majority, (Justices Cowen and Bronson,) Chief Justice Nelson dissenting, which of course weakened their authority.

The loss of the steamer Lexington, on Long Island Sound, by fire, on the 10th January, 1840, has tested the soundness of the principle thus clearly stated by Judge Cowen. In *Hale* vs. *The New Jersey Steam Navigation Company*,[1] the Supreme Court of Connecticut, in 1843, decided, that the contract being made in New York to carry carriages from thence to Boston, the law of New York was the law of the contract, and in ascertaining what that rule was, they followed the decisions so far as regarded public notices, but did not find it necessary to consider what would be the case if there had been a bill of lading containing an express exception of fire, nor what would be the law of Connecticut in such cases. In 1848, the same question in relation to a bill of lading came before the Supreme Court of the United States, in *The New Jersey Steam Navigation Company* vs. *The Merchants' Bank*,[2] and Judge Nelson decided that if *Gould* vs. *Hill*, was the law of New York, it was not the law of the commercial world, and therefore they were not bound to recognize it. This case established the doctrine in conformity with the settled English rule, as stated by Lord Tenterden,[3] that the exception of fire in a bill of lading was a valid one, and *Gould* vs. *Hill*, was thus denied to be law, by the highest tribunal in the United States.

On 28 September, 1850, The Supreme Court of the City of New York, in *Dorr* vs. *The New Jersey Steam Navigation Company*,[4] following the lead of the Supreme Court of the United States,

[1] 15 Conn. 539.
[2] 6 Howard, 344.
[3] Abbott on shipping, 321, 380.
[4] 4 Sanford, S. C. Reports, 136.

treats *Gould* vs. *Hill* as overruled, and no longer the law of New York.

The rule therefore laid down in 1838, and lauded by Mr Angell, in his able work on carriers, has had but a short lived existence, and the ground upon which it was put by Judge Cowen, in *Gould* vs. *Hill*, shows that in overruling that case *Hollister* vs. *Nowlen*, and *Cole* vs. *Goodwin*, *Black* vs. *Faxton*,[1] and *The Camden and Amboy Rail Road and Transportation Company* vs. *Belknap*,[2] fall with it, and that the only sound rule is that of the Old English Common Law, as expounded by Judge Story, and confirmed by the express approbation of the English Courts.

The New York decisions on the subject of common carriers, have given rise to some singular changes of opinion in cases hardly distinguishable from them. In *Alexander* vs. *Greene*,[3] the Supreme Court of New York, in 1842, decided that the proprietors of a steam tow boat were not common carriers, and therefore could, like all other bailees, exempt themselves by express agreement from all liability. This was reversed in December, 1844, in the old Court of Errors,[4] nearly unanimously, for various reasons, but not deciding that they were common carriers. In 1849, in *Wells* vs. *The Steam Navigation Company*,[5] the present Court of Appeals decided that they were not common carriers, and Judge Bronson, in delivering the opinion of that tribunal, remarks very sarcastically upon the impossibility of ascertaining on what ground the former Court of Errors reversed his decision in 3 Hill. The whole of this difficulty would have been avoided if the Supreme Court of New York had followed the doctrine of the Common Law, and had declared that common carriers, like all other bailees, could limit their responsibility by express or implied contract.

We have perused with great pleasure the late English cases reported in the present year, which carry to its utmost extent the doctrine which we believe to be that of the common law. They are the decisions of the three great Courts of Common Law—The Queen's Bench, The Common Pleas, and the Exchequer, composed

[1] 21 Wendell, 153. [2] Wendell, 354. [3] 3 Hill, 9.
[4] 7 Hill, 533. [5] 2 Comstock, 204.

of fifteen very able Judges, and some of them equal to any that have ever sat in Westminister Hall, forming a body of authority spread over a few months, which can rarely be met with on any single branch of the law.

In *Chippendale* vs. *The Lancashire and Railway Company*,[1] on the 26th November, 1851, the Court of King's Bench, following their own decisions in *Shaw* vs. *The York and Midland Railway Company*,[2] and *Austin* vs. *The Manchester, Sheffield, and Lincolnshire Railway Company*,[3] decided that a ticket given by the Company and signed by the Bailor or his Agent, containing the following—"N. B. This ticket is issued subject to the owner undertaking all risks of conveyance whatever, as the Company will not be responsible for any injury or damage howsoever caused, occurring to live stock of any description travelling upon the Lancashire and Yorkshire Railway Company, or in their vehicles," formed a special contract between the parties, and exempted the Company from all risk whatever of damage to the animals during the journey.

A similar decision was made as we have already stated, by the Court of Common Pleas, on the 8th May, 1852,[4] and in *Carr* vs. *The Lancashire and Yorkshire Railway Company*[5] decided on the same day, the Court of Exchequer laid down the same rule in its broadest extent. Baron Parke (a very great authority) said "such a contract was made in this case, and the only question is as to the *meaning* of the contract; according to the old cases there was this limitation upon the construction of *carriers' notices—that unless a carrier excluded his liability in express terms*—according to the ordinary terms of the notice, he would be responsible for gross negligence. The practice of a carrier protecting himself by notice, was put an end to by the carrier's act." Baron Martin said "This is the case of a special contract which the Plaintiff has adopted and assented to. *Without doubt*, at common law a carrier is entitled to make a special contract." "*Insurers are answerable for gross negligence, and if goods may be insured, others may con-*

[1] 21 Law J. R. (Q. B.) 21. [2] 20 Law J. R. (Q. B.) 440. [3] 18 ibid. 181; 13 (Q. B.) 347.
[4] 21 Law J. R. (C. P.) 179. [5] 21 Law J. Rep. Exchequer, 261.

tract that they will not be answerable for their own gross negligence." "I am to look only at the terms of the notice, and if the carrier had been desirous of preparing a contract by which he would get rid of his liability, *in respect of gross negligence*, he could not have used more apt words than those that are contained in this notice." "With respect to the argument of inconvenience, the answer is, that we have nothing to do except to carry out this contract, the parties concerned and not ourselves are to judge of the inconvenience. *If we hold the carriers in this case responsible for gross negligence, we shall place them in the situation of insurers and underwriters.*"

On the 10th May, 1852, in *The Great Northern Railway Company* v. *Morville*,[1] the Queen's Bench, in considering a ticket issued by the appellants similar to the one before quoted, and how far it formed a special contract under the circumstances of that particular case, give their construction of the Carrier's Act of 1830. Justice Coleridge said: "The case shews sufficient to induce us to treat the Railway Company as common carriers of horses. That brings them within the Act of Parliament. It is conceded for the respondent, that the horse was carried under a contract, *but it is said that was a mere contract to be inferred from the notice in the ticket;* and it is concluded that as the notice spoken of in section 4 of the Carrier's Act was only available if knowledge of it was brought home to the party sending the goods from which knowledge—assent was to be inferred—and from that assent a contract—that the Legislature clearly intended to distinguish *between that sort of contract created by the notice* and the contract mentioned in section 6, but no stress has been laid upon the word "public" in the 4th section. Now, I think that that word receives a meaning from the preamble, for it is there said that carriers had difficulty in fixing the party with knowledge of notices published by them. It seems to me that section 4 refers to such public notices, whereas section 6 relates to contracts made by the parties when they come together. This case, I think, falls clearly within section 6. *The plaintiff comes with*

[1] 21 Law J. Rep. (Q. B.) 319.

his horse to the station, pays for the carriage of it, and the clerk produces the ticket; whether the plaintiff signs it or not is immaterial; if he agrees to the terms set forth in it, he is bound by them."

Mr. Justice Erle said: "Whether the plaintiff had signed the paper, or whether the clerk had mentioned the terms, or whether the latter had delivered to the plaintiff a ticket saying what the terms were, there would have been in each case good evidence of an agreement between the parties."

In *De Rothschild* v. *The Royal Mail Steam Packet Company*,[1] the Court of Exchequer, on the 2d of June, 1852, decided that loss by thieves was not within the exception in the bill of lading given by the Company, which was in these words: "The act of God, the Queen's enemies, pirates, robbers, fire, accidents from machinery, boilers and steam, the dangers of the seas, roads and rivers of whatever nature or kind soever, excepted."

It was not a loss by "robbers," or by "dangers of the roads."

In *Fowles* v. *The Great Western Railway Company*,[2] the same Court decided that a Railway Company carrying goods beyond their own line may limit their liability to their own railway.

The reasoning of these cases is unanswerable, and establishes conclusively, as a settled principle of the common law, that common carriers can, like all other bailees, limit their liability by express agreement, and also by implied contract, and that where the knowledge of such limitation is brought home to the bailor, either by public or private notice, the acceptance of the goods to be carried is a qualified acceptance and not a general one, and that it lies on the bailor to show that he repudiated the terms of the notice or the contract of which it was a part. If the bailor does not choose to subject his goods to such an acceptance, he must not send them, but pursue his remedy in another form.

All goods sent to New York, either from Great Britain or the other States of the Union, are subject to the rules of the common law, as understood in England and elsewhere, whilst goods sent from

[1] 21 Law J. Rep. (Exch.) 273. [2] Lovell's Digest, 1852, p. 523.

New York to the same places are subjected to the unheard of rigor of a *new rule* laid down by the bare majority of a small Court, infinitely more strict than the edicts of the Roman Prætor or the law of any other civilized nation. In fact, the law is made to depend upon which end of a railway or a steamboat route you take your departure from.

A ship is loading in New York for a foreign port, and is burnt, with her cargo, at the wharf. By the law of this place, as evidenced by the decisions of its highest tribunal, the ship owner is liable for the cargo on board, although he may have had in his bill of lading the exception of fire, and his consolation is that it is not the act of God or of the people's enemies. Can this be the law of an enlightened community? The cargo so burnt is insured by its owner, he receives the amount from the insurer, and then the insurer, in the name of the insured, can recover the amount paid from the owner of the ship. Such is the inevitable result of such a doctrine.

The old common law, as understood by England and other States, allows the exemption, and the loss falls on the insurer who has contracted to pay it, and not on the ship owner who has contracted not to pay it. There is but one simple course for the Judiciary of New York to pursue—to reject at once their new rule *in toto*, and return to the rule of common sense, which allows parties to make their own contracts. A.

PROFESSIONAL OPINIONS.

CASE.[1]

Samuel Richardson, being seized of sundry Ground Rents for a term of Years, and of the Reversion in fee of and in Certain Lots

[1] The following case and opinions will, we do not doubt, prove interesting to our readers, not only from the nature of the question involved, which is one not altogether settled, but also as furnishing a specimen of the discussions of the colonial bar of a century ago. Mr. Galloway and Mr. Dickinson, the authors of these opinions, were both among the ablest of the provincial lawyers of their time, and played distinguished and rival parts in the politics of Pennsylvania before and during the